

FILED BY CLERK

JAN 23 2007

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

GEORGE MENDEZ,

Appellant.

)  
)  
) 2 CA-CR 2005-0354  
) DEPARTMENT A  
)

MEMORANDUM DECISION

) Not for Publication  
) Rule 111, Rules of  
) the Supreme Court  
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031786

Honorable Kenneth Lee, Judge

AFFIRMED

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Terry Goddard, Arizona Attorney General  
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Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Alex Heveri

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P E L A N D E R, Chief Judge.

¶1 After a jury trial, appellant George Mendez was convicted of second-degree murder. On appeal, he argues the trial court erred in excluding expert testimony about his cognitive deficits and in refusing to give certain requested jury instructions. Finding no error, we affirm.

## **BACKGROUND**

¶2 We view the facts in the light most favorable to sustaining the conviction. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In May 2003, the victim, an elderly amputee, was found murdered in his home. He had sustained sixty-seven blunt force and sharp force injuries apparently caused by a variety of weapons, including, inter alia, a knife, a potato peeler, a crowbar, and a saw blade. The victim's heavy pool table had been overturned, and it appeared that his "entire residence had been ransacked."

¶3 Around the time of the homicide, Mendez, who had been the victim's friend and neighbor, was "seen carrying a TV down the street, covered with blood." Mendez's niece testified that upon his arrival at his home, Mendez had bathed twice, changed his clothes, and washed his bloody clothes and shoes. She also testified that he had returned several times to the victim's home nearby and had brought various items back from there with him.

¶4 Analysis of traces of DNA collected from Mendez's hands did not exclude the victim as a possible contributor. Mendez also had several injuries to his abdomen, legs, and forehead, and his footprints were found in the blood on the floor of the victim's home. In

addition, the victim's blood was found on the sandals Mendez had worn when he had returned there.

¶5 When interviewed by the police, Mendez initially denied having been in the victim's home or knowing anything about his death. But when confronted with the evidence against him, Mendez admitted to having entered the victim's home, finding him dead, and taking his property. Mendez initially was charged with first-degree, felony murder, and the state gave notice of its intent to seek the death penalty. After a competency hearing held pursuant to Rule 11, Ariz. R. Crim. P., 16A A.R.S., however, the trial court found that Mendez was "mentally retarded" and ruled that "it [wa]s appropriate to remove the option of the death penalty as a sentence."

¶6 Mendez's defense theory at trial was that he had not killed the victim but had merely "committed the crime of burglary" when he entered the victim's residence "after the murder had occurred and then decided to take the [victim's] property." After resting its case, the state withdrew its felony-murder allegation and proceeded only under a first-degree, premeditated murder theory. The jury found Mendez guilty of the lesser-included offense of second-degree murder. The trial court sentenced him to twenty-two years in prison. This appeal followed.

## DISCUSSION

### I. Exclusion of expert testimony

¶7 Mendez first contends the trial court abused its discretion in precluding him from presenting expert testimony “about his retardation and frontal lobe damage . . . that went to the heart of his defense.” That ruling, Mendez argues, violated his constitutional due process right to present a defense and his right to compulsory process. *See* U.S. Const. amend. V, VI, XIV; Ariz. Const. art. II, §§ 4, 24.

¶8 Mendez sought to introduce testimony of two experts, both clinical neuropsychologists. In an offer of proof conducted outside the jury’s presence at the end of trial, one of the experts testified that Mendez suffered from “organic impairment in the frontal lobes [of the brain]” that would cause a person to “have very basic difficulties with problem solving” and “compromised impulse control.”<sup>1</sup> Based on various neuropsychological tests he had conducted, that expert also opined that Mendez was “likely to, frequently and without reflection, persist in courses of action that might seem ill-advised to others.” The other expert, who had testified a year earlier in the Rule 11 proceedings, apparently would have testified that Mendez had a relatively low intelligence quotient, or I.Q., and met the diagnostic criteria of being “mildly mentally retarded.”

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<sup>1</sup>Mendez’s offer of proof, which the trial court approved and to which the state did not object, also included by reference the prior testimony and reports the two experts had furnished in pretrial proceedings.

¶9 Mendez did not claim below, nor does he urge on appeal, that he was legally insane or lacked the ability to premeditate or otherwise form the intent to kill or steal. Nor did Mendez seek to assert a “diminished capacity” defense. But Mendez argued the proffered expert testimony about his cognitive deficits was necessary to explain his strange behavior in taking the victim’s property without either reporting the homicide or instead just “walk[ing] away” after finding the victim already dead. In other words, he argued the expert testimony was required to rebut the state’s theory that, “because he committed the burglary [and theft], he must have committed the homicide.”<sup>2</sup>

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<sup>2</sup>We note that Mendez’s arguments below were somewhat confusing and apparently changed as the trial progressed. For example, at the start of trial Mendez eschewed any attempt to argue his cognitive deficits “were reasons he didn’t call the police when he saw the body,” but rather argued the expert testimony was needed to “complete[] the story as to who Mr. Mendez is.” As he continued to urge admission of the expert testimony during trial, Mendez argued, inter alia, he “could not form malice aforethought,” that is, “could not premeditate.” In opposing the state’s motion in limine, however, Mendez sought to introduce the expert testimony “in order to show that, unlike an average person, [his] cognitive impairment [was] likely to result in a persistent pattern of impulsive decision-making and behavior, exacerbated by consistently deficient self-monitoring.” And he argued “the impulsive behavior and poor judgment in this case relate not to his state of mind during the murder alleged by the state, but to his actions in stealing things after the murder had been committed by someone else.” Similarly, after his offer of proof at the end of trial, Mendez argued the proffered expert testimony “was a vital part of [his] defense” because it was (1) “relevant relative to [his] decision to touch the [victim’s] body,” (2) “relative to his performance in answering questions from the police,” (3) “relative to his performance in going into a home and not calling the police upon seeing a dead body,” and (4) “subsequently then taking property from that residence.” As the trial court noted, those arguments “expanded the areas” Mendez previously had argued on the relevance of the proffered expert testimony.

¶10 In granting the state’s motion in limine to preclude Mendez’s proffered expert testimony, the trial court found the evidence “marginally relevant” at best. Analyzing the proffered evidence under Rule 403, Ariz. R. Evid., 17A A.R.S., the court also found “a good danger for the jury to get confused about this and what it applies to even with instructions.” “Further complicating the situation,” the trial court noted, was evidence that Mendez “was intoxicated at or near the time he was taking the [victim’s] property.” *See* A.R.S. §§ 13-502(A) (“Mental disease or defect does not include disorders that result from acute voluntary intoxication . . .”), 13-503 (“Temporary intoxication resulting from the voluntary ingestion [or] consumption . . . of alcohol . . . does not constitute insanity and is not a defense for any criminal act or requisite state of mind.”). Accordingly, the trial court precluded the expert testimony, finding it “best left to mitigation if the jury does, in fact, convict the defendant of the charged offenses.” We review a trial court’s exclusion of expert testimony for an abuse of discretion. *State v. Talmadge*, 196 Ariz. 436, ¶ 12, 999 P.2d 192, 195 (2000).

¶11 Mendez argues his “defense theory hinged on persuading the jury that [he had] stole[n] his friend’s property, but only after discovering him dead.” As he did below, Mendez insists he “did not seek to establish insanity or argue diminished capacity as a defense,” but rather sought to introduce the expert testimony merely “to explain to the jury why [he] behaved, appeared, thought and reacted differently and oddly compared to an otherwise functioning person.” According to Mendez, “[t]he proffered evidence was

necessary and relevant” to explain why he “would loot, rather than report his neighbor’s murder” and “to rebut the state’s motive for the murder.”<sup>3</sup>

¶12 Evidence showing a defendant’s “diminished capacity” or “irresistible impulse” is inadmissible unless it meets the requirements of A.R.S. § 13-502 for insanity. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997) (“Arizona does not allow evidence of a defendant’s mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime.”); *State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982) (“The defenses of diminished capacity and irresistible impulse have been rejected by the legislature . . . .”); *see also Clark v. Arizona*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2709, 2727 (2006) (*Mott* was “meant to confine to the insanity defense any consideration of characteristic behavior associated with mental disease.”).

¶13 In challenging the element of premeditation in a first-degree murder case, however, a defendant may present “character trait” evidence that he tended to “act[] impulsively,” such as psychiatric expert testimony that a defendant “had difficulty dealing with stress and in stressful situations his actions were more reflexive than reflective.” *State v. Christensen*, 129 Ariz. 32, 34-35, 628 P.2d 580, 582-83 (1981); *see also Mott*, 187 Ariz. at 544, 931 P.2d at 1054 (because defendant in *Christensen* “was not offering evidence of his diminished capacity, but only of a character trait relating to his lack of

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<sup>3</sup>We note that, after it abandoned its theory of felony murder during trial, the state did not argue that Mendez’s burglary or theft was a motive for his having murdered the victim.

premeditation,” he was not precluded from presenting expert testimony that “he had a tendency to act impulsively” and, therefore, he had not premeditated the homicide). But a defendant may not present expert testimony that he “was or was not acting reflectively at the time of a killing.” *Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84; *see also State v. Montijo*, 160 Ariz. 576, 580, 774 P.2d 1366, 1370 (App. 1989) (expert may not testify on whether defendant “was acting impulsively and without reflection at the time of the crime”).

¶14 Differentiating permissible from impermissible mental health evidence in cases such as this is, at best, a difficult task. *See Mott*, 187 Ariz. at 548, 931 P.2d at 1058 (Zlaket, C.J., concurring in the result) (referring to “a generous measure of disharmony in the case law” and lamenting that *Mott* “only adds to the lack of consistency”). Mendez argues his proffered expert testimony was admissible under *Christensen* as “[c]haracter trait evidence of impulse behavior and acting without reflection.” In contrast, relying on *Mott* and *Clark*, the state contends the trial court properly precluded the expert testimony “as evidence of diminished capacity to rebut *mens rea*.” We do not fully embrace either side’s argument.

¶15 Unlike Mendez, the defendant in *Christensen* did not deny having killed the victim and sought to introduce expert testimony solely on the issue of premeditation. 129 Ariz. at 34, 628 P.2d at 582; *see also Mott*, 187 Ariz. at 544, 931 P.2d at 1054. *Christensen* did not broadly authorize, in blanket fashion, any and all character trait evidence in a first-degree murder case, particularly when, as here, the defendant denies

having killed the victim and, therefore, is not directly challenging the element of premeditation. Thus, *Christensen* did not automatically render admissible Mendez's proffered expert testimony.

¶16 But this case also is unlike *Mott*, in which the court held that “the proffered evidence was inadmissible as an attempt to prove defendant’s diminished capacity.” 187 Ariz. at 538, 931 P.2d at 1048. In *Mott*, the expert testimony “was [offered] to demonstrate that defendant was not capable of forming the requisite mental state of knowledge or intent,” that is, “to demonstrate that defendant’s mental incapacity negated specific intent.” 187 Ariz. at 540, 544, 931 P.2d at 1050, 1054. Mendez expressly and repeatedly disavowed any such purpose for offering the expert testimony here. See ¶ 9 and n.2, *supra*.

¶17 Relying on *Clark*, the state also categorizes Mendez’s proffered expert testimony as the type of “judgment-dependent, opinion evidence of diminished mental capacity” that *Mott* validly prohibits, as distinguished from admissible, “[o]bjective, ‘observational’ evidence that merely conveys to the jury the defendant’s words and actions.” See *Clark*, \_\_\_ U.S. at \_\_\_, 126 S. Ct. at 2735 (“Unlike observational evidence bearing on *mens rea*, capacity evidence consists of judgment, and judgment fraught with multiple perils.”). But the proffered evidence here is not easily classifiable under *Clark*, which was decided well after the trial in this case.<sup>4</sup>

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<sup>4</sup>*Clark*, of course, applies here because it was decided while this case was still pending. Cf. *State v. Aleman*, 210 Ariz. 232, ¶ 22, 109 P.3d 571, 578 (App. 2005). But the trial court did not have the benefit of *Clark*, which, in any event, does not undermine

¶18 The parties also disagree on whether the proffered evidence was relevant. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401, 17A A.R.S. As noted in ¶ 11, *supra*, Mendez argues that the evidence was relevant to explain his “impulsiveness” and to make “plausible” his defense that he had merely stolen from his murdered friend.

¶19 In its discretion, a trial court may admit expert testimony “where there is a reasonable basis to believe that the jury will benefit from [it to] explain[] recognized principles of social or behavioral science which the jury may apply to determine issues in the case.” *State v. Lindsey*, 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986). Mendez, however, was not charged with burglary or theft, but rather, only with murder; and he in fact readily acknowledged having stolen property from the victim. And, as the state argues, “[a]ny opportunistic thief, mentally retarded or not, might steal property from a murder scene before the police arrive.” Thus, although possibly relevant to explain Mendez’s post-murder actions, *see Lindsey*, the evidence arguably did not make it any more or less likely that he had killed the victim, the only issue (other than mens rea) the jury ultimately had to decide.

¶20 But even assuming that the proposed expert testimony was relevant “character trait” evidence of Mendez’s impulsivity, rather than inadmissible evidence of diminished

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the court’s ultimate ruling based on Rule 403, Ariz. R. Evid., 17A A.R.S.

capacity, and that it was offered merely to explain his having taken the victim's property, the trial court did not abuse its discretion in excluding the testimony under Rule 403, Ariz. R. Evid. That rule provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The state's motion below to preclude expert testimony specifically focused on the concerns set forth in Rule 403, as did the trial court's evidentiary ruling. Although Mendez suggests that any such concerns could have been adequately ameliorated through appropriate jury instructions, we cannot say the trial court abused its discretion in concluding otherwise.

¶21 "Rule 403 weighing is best left to the trial court and, absent an abuse of discretion, will not be disturbed on appeal." *State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993); *see also State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002). On this record, we have no basis for second-guessing the trial court's finding that the proffered evidence, "marginally relevant at best," would have "open[ed] the door to all this confusion by the jury, because they're going to have this rub-off effect, saying . . . if he really couldn't form the mental intent . . . [to] take this property, . . . why isn't that also applied to the actual murder itself?"

¶22 As the trial court said earlier during trial, introducing evidence of Mendez's cognitive deficits to explain his theft of the victim's property would have given rise to "a real

risk of the jury saying, well, if that explains away this one, why doesn't it explain away the actual offense he's charged with?" In light of the marginal relevance of the evidence and the clear danger of confusion to a jury in attempting to differentiate proper from improper use of mental health evidence under *Christensen* and *Mott*, we cannot say the trial court abused its discretion in precluding the expert testimony.<sup>5</sup> See *Clark*, \_\_\_ U.S. at \_\_\_, \_\_\_, 126 S. Ct. at 2731, 2734 (recognizing that, under the multiple factors set forth in Rule 403, "the right to introduce relevant [mental health] evidence can be curtailed if there is a good reason for doing that," and that "there is the potential of mental-disease evidence to mislead jurors" by "suggest[ing] that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all").

## II. Jury instructions

¶23 Mendez next argues "[t]he court's failure to give [his] requested jury instructions on second-degree burglary and third-party responsibility was fundamental error." Before the state withdrew the felony-murder charge against him, Mendez asked the trial court to instruct the jury on both second-degree burglary and third-party responsibility.<sup>6</sup>

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<sup>5</sup>Mendez also argues that "[t]he evidence was necessary to rebut the state's theory." But, the only case he cites in support of this proposition, *State v. Talmadge*, 196 Ariz. 436, ¶¶ 24-25, 999 P.2d 192, 196-97 (2000), involved "extraordinary facts" wherein a trial court precluded expert surrebuttal testimony as a sanction for late disclosure. Those facts are not present here, nor is this one of the "rare case[s]" of an abuse of discretion by the trial court in refusing to admit surrebuttal testimony. *Id.* ¶ 24.

<sup>6</sup>In his opening brief, Mendez refers to requests for both second- and third-degree burglary instructions. As the state correctly points out, however, he did not request a third-degree burglary instruction below. And, in view of his argument heading that the trial

He argues the trial court should have instructed the jury as he requested because “[a] defendant is entitled to a jury instruction on any defense theory supported by the evidence.” We review a trial court’s refusal to give requested jury instructions for an abuse of discretion and resulting prejudice. *State v. Garfield*, 208 Ariz. 275, ¶ 11, 92 P.3d 905, 908 (App. 2004).

¶24 “A defendant is entitled to a jury instruction on any theory reasonably supported by the evidence.” *State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. 1990). Likewise, “[w]here a defense theory is reasonably supported by competent evidence, it is reversible error to refuse an instruction as to the theory.” *State v. Govorko*, 23 Ariz. App. 380, 384, 533 P.2d 688, 692 (1975). In his reply brief, Mendez relies on *State v. Reynolds*, 11 Ariz. App. 532, 466 P.2d 405 (1970), for the proposition that he was entitled to a second-degree burglary instruction though the state ultimately charged him solely with premeditated first-degree murder rather than first-degree murder based on felony murder, and “regardless of whether the defense is a distinct, rather than a lesser-included, offense.” But, as this court pointed out in *State v. Teran*, 130 Ariz. 277, 278, 635 P.2d 870, 871 (App. 1981), in *Reynolds* “the two separate offenses were mutually exclusive.” That is not

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“court’s failure to give [his] requested jury instructions on *second*-degree burglary . . . was fundamental error,” (emphasis added) we assume Mendez’s references to third-degree burglary were merely misstatements. In any event, because he did not request a third-degree burglary instruction below, the argument is forfeited absent fundamental error. See *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). As explained above, we find no error, much less fundamental error, in the trial court’s failure to give a burglary instruction.

so here. In the absence of the felony-murder theory, even if the jury were to have found that Mendez had committed burglary, such a finding “would not mean that he was innocent” of the first-degree, premeditated murder charge. *Teran*, 130 Ariz. at 278, 635 P.2d at 871.

¶25 Indeed, under circumstances other than those presented in *Reynolds*, when a defendant requests an instruction on an uncharged offense, he “is not entitled to an instruction . . . even though he might have been charged with and convicted of that offense.” *State v. Politte*, 136 Ariz. 117, 121, 664 P.2d 661, 665 (App. 1982); *Teran*, 130 Ariz. at 278, 635 P.2d at 871. That is the situation here. As the state points out, quoting *State v. Brown*, 195 Ariz. 206, ¶ 10, 986 P.2d 239, 242 (App. 1999), “it is the charging document and not the evidence that determines the issue.” Therefore, the trial court did not err in failing to instruct the jury on the law of burglary.

¶26 Mendez also contends he was entitled to his requested third-party responsibility instruction because “there was evidence that third-parties were involved.” In support of that theory, Mendez points to evidence of “multiple wounds inflicted by multiple weapons,” “missing money that was never recovered,” “hair in the victim’s hand from an unidentified person,” “the victim’s fear of other people,” a “strange truck parked in his driveway the day after the murder,” and the fact that the victim’s large, heavy pool table was overturned.

¶27 We first note that Mendez’s reliance on *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002), is misplaced. That case addressed the standard for admitting evidence

of third-party guilt, not the standard for determining whether a defendant is entitled to an instruction on third-party culpability. *Id.* ¶ 12. And, to the extent *Gibson*'s evidentiary standard somehow applies in the jury instruction context, it fails to support Mendez's argument. The *Gibson* court stated that "evidence 'need only tend to create a reasonable doubt that the defendant committed the offense,'" in order to be admissible. *Id.* ¶ 15, quoting *Johnson v. United States*, 552 A.2d 513, 517 (D.C. 1989). Although the evidence Mendez cites arguably suggested that others were involved in the crime, as the state points out, it does not necessarily cast doubt on Mendez's own guilt because "he could have been one of [multiple assailants]" and, therefore, "no less culpable based on that hypothesis alone."

¶28 Additionally, as the trial court implicitly noted in refusing the instruction, a trial court is "not required to give a proposed instruction when its substance is adequately covered by other instructions." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). The trial court instructed the jury that Mendez had pled not guilty, that the state had "the burden of proving [Mendez] guilty beyond a reasonable doubt" and of "prov[ing] each element of the charge" against him by that standard, and that the jury had to "decide whether [he] is guilty or not guilty by determining what the facts in the case are." Under those instructions, if the jury had found that only unidentified third parties had murdered the victim, it obviously would have found Mendez not guilty.

¶29 The trial court also instructed the jury that “[t]he mere presence of a defendant at a scene of a crime, . . . together with knowledge a crime is being committed is insufficient to establish guilt.” That instruction told the jurors that if, as Mendez extensively argued in his defense, he merely came onto the scene of a crime already committed by others, they should not convict him. Thus, the instructions given adequately addressed the substance of Mendez’s requested third-party culpability instruction, and to the extent the latter referred to “evidence that an unknown person other than the defendant committed the killing,” it constituted an impermissible comment on the evidence. *See* Ariz. Const. art. VI, § 27; *State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶30 Finally, even if the court’s instructions did not adequately cover the issue of third-party culpability, in view of the evidence admitted on that issue, the instructions actually given, and Mendez’s vigorous arguments of third-party guilt, he has not established any prejudice resulting from the trial court’s failure to give the proposed instruction. *See Garfield*, 208 Ariz. 275, ¶ 11, 92 P.3d at 908. In sum, we find no reversible error in the trial court’s refusal to give Mendez’s proposed instructions.

### **DISPOSITION**

¶31 Mendez’s conviction and sentence are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge